

SUPPORTED DECISION MAKING

Taylor Roth, MA

Brad Meurrens, MPA

Disability Rights
Nebraska

Disability Rights Nebraska

Protection and Advocacy for People with Disabilities

GUARDIANSHIPS

- **The number of Americans under guardianship has increased three-fold since 1995, with most under plenary guardianship**
 - But no systemic or individualized analysis of whether these guardianships were needed or subsequent analysis whether the person still needed guardianship
- **Plenary, or “full” guardianships are more the norm than “limited” guardianships**
 - As long as the law permits plenary guardianship, courts will prefer to use it... Even though such guardianships are only appropriate in a sub-set of cases
 - Empirical studies indicate that courts do not take advantage of the limited guardianship option and rarely limit a guardian’s authority

OVERBROAD OR UNDUE GUARDIANSHIP

The significant increase in guardianships, coupled with the predominance of plenary guardianship, raises concern about overuse of “overbroad” or “undue” guardianships

Guardianships are overbroad or undue when

- They are imposed on people who are able to make their own decisions and direct their own lives
- They restrict more of the person’s rights than necessary

(SOME OF) THE STAKES

August 2017

American Bar
Association's House of
Delegates adopted a
resolution on
supported decision
making

"That the American Bar Association urges state, territorial, and tribal legislatures to amend their guardianship statutes to require that supported decision-making be identified and fully considered as a less restrictive alternative before guardianship is imposed; and urges courts to consider supported decision-making as a less restrictive alternative to guardianship"

Marginalization:

Overly broad and undue guardianship denies the individual self-determination, marginalizes that person, and removes him or her from being involved in decision making

Lack of self-determination

Overbroad or undue guardianships decrease self-determination as someone else is given the power to make decision for the ward, instead of the ward making their own decisions

Isolation

Overbroad or undue guardianships can result in the same isolation as people who are institutionalized

- Guardians control where wards live, whether they receive medical care, who they see, and even when they work or get married

WHAT IS SUPPORTED DECISION MAKING?

American Bar Association explanation

“Recently, supported decision-making... has emerged as a cutting edge alternative to guardianship, placing the individual with a disability at the center of the decision-making process. Supported decision-making describes the process by which most individuals make decisions - by consulting with friends, family, social services, community organizations, and and/or other sources of support to weigh the pros and cons of a decision, review potential outcomes, and finally make a choice. The practice of supported decision-making takes many forms - from recognition of organic decision-making networks to formal, written supported decision-making agreements.”

There is no SINGULAR definition of “Supported Decision Making”

- It occurs when “people use trusted friends, family members, and professionals to help them understand the situations and choices they face, so they may make their own decisions”

Characteristics

- Ensures that the person is and remains the “causal agent” over his or her life by being the focus of the decision-making process and the final decision-maker
 - While recognizing that the individual may need some assistance in making and communicating a decision
- A person’s autonomy, presumption of capacity, and right to make decisions is on an equal basis with others

WHAT IS SUPPORTED DECISION MAKING

National Guardianship Association Position Statement

“The National Guardianship Association supports ongoing research to determine the effectiveness of supported decision-making models as alternatives to guardianship. Guardianship should be utilized only when lesser restrictive supports are not available. Alternatives to guardianship, including supported decision making, should always be identified and considered whenever possible prior to the commencement of guardianship proceedings.”

Supported Decision Making can be “of more or less formality and intensity” depending upon the person’s abilities and preferences

- Because every person makes decisions in his or her own way
- Support may include informal advice from friends, family, and others who “speak with, rather than for, the individual with a disability”
- Others may opt for more formal arrangements, like private Supported Decision Making agreements or legal Power of Attorney and Advanced Directive or “Micro Boards”

TEXAS

Supported Decision Making has been adopted by at least 9 other states or jurisdictions:

Alaska, Delaware, Maine, Missouri

Rhode Island, Washington, D.C.

Wisconsin

First state to adopt Supported Decision Making into law (2015)

- Recognized “Supports and Services”—formal and informal resources and assistance enabling people to care for their health, manage their finances, and make personal decisions—as an alternative to guardianship (Tex. Est. Code Ann. §1101.101, 2015)
- Amended its guardianship law to require courts to find by clear and convincing evidence that a person cannot make decisions with the assistance of such “Supports and Services” before placing the person under guardianship (Tex. Est. Code Ann. §1002.031, 2015)
- Passed other laws giving legal recognition to Supported Decision Making agreements (Tex. Est. Code Ann. §1357.003, 2015)

INDIANA

For other state laws, see the [“In Your State”](#) interactive site from the National Resource Center for Supported Decision Making

Signed Senate Enrolled Act 380 into law on April 24, 2019

- Recognizes Supported Decision Making Agreements as a valid way for someone to demonstrate decision-making capacity
- Requires less restrictive alternatives including Supported Decision Making to be considered before the court will appoint a guardian

EMPIRICAL: JENNY HATCH

“Meet Jenny Hatch” [Video](#)

“Justice for Jenny” [Video](#)

- In 2013, Margaret “Jenny” Hatch, a woman with Down syndrome, defeated a petition to place her under a permanent plenary guardianship because she had established an effective Supported Decision Making network (Ross v. Hatch, 2013)
- At trial, Ms. Hatch presented evidence that she worked with supportive friends and professionals to make her own decisions
- The court named Ms. Hatch’s preferred supporters as her temporary limited guardians for one year, “with the ... goal of transitioning to the supportive [sic] decision making model”
- The court charged the temporary guardians to “assist [Ms. Hatch] in making and implementing decisions we have heard termed ‘supported decision making’”

MORE INFORMATION

[American Bar Association Resources](#)

[National Resource Center for
Supported Decision Making](#)

American Civil Liberties Union

- [“Supported Decision Making & The Problems Of Guardianship”](#)
- [Supported Decision Making Resource Library](#)

YouTube Video Playlist

- [Introduction and Guide to Supported Decision Making](#)